Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of The Effect of Foreign Mobile Termination Rates on U.S. Customers	IB Docket No. 04-398

COMMENTS OF THE GSM ASSOCIATION

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SUMMARY

The Commission's inquiry into foreign mobile termination rates ("FMTRs") raises the unsettling prospect of extraterritorial regulation that both exceeds the Commission's jurisdictional limits and fails to address meaningfully the problem that some perceive. Accordingly, the GSM Association ("GSMA"), the global trade association representing the GSM industry, urges the Commission to exercise caution when scrutinizing several aspects of the issue before contemplating taking any regulatory action.

First, as GSMA explains in part I, the Commission should recognize its jurisdictional limits. As a legal matter, the D.C. Circuit's decision upholding the Commission's 1997 *Benchmark Order* suggests that the Commission lacks jurisdiction to impose extraterritorial regulation in this context. FMTRs fall outside the Commission's jurisdiction because, among other reasons, U.S. international carriers (which fall within the Commission's regulatory scope) typically lack contractual privity with the foreign mobile providers that levy the termination charges. And, as a prudential matter, the principle of comity counsels against asserting such extraterritorial jurisdiction in any event, particularly in light of the efforts of national and regional regulators to keep a tight rein on mobile termination rates within their borders.

Second, as detailed in part II, FMTRs as a threshold matter do not harm consumer welfare. Differences in demand characteristics between different governing regimes account, at least in part, for surcharge rates overseas that exceed comparable rates in the United States. In addition, the surcharges that foreign mobile providers levy to terminate

calls are only a single element among many (*e.g.*, intermediary mark-ups and other factors) that contribute to the FMTRs that appear on U.S. callers' bills. Further, the benefits associated with calls to mobile subscribers may also largely offset international termination surcharges.

Third, the Commission lacks the data necessary to develop any regulation in this area, and it lacks the resources to analyze the data even if they were available. As GSMA explains in part III, the Commission has not collected sufficiently detailed information regarding the roughly 160 countries that its regulation would affect. Indeed, there is reason to doubt whether any single regulatory authority could compile such adequate country-specific information and then analyze it in a manner that would allow for a single, comprehensive rulemaking effort. Rather, such market-specific endeavors are best left to individual national and regional regulators, which are intimately familiar with the unique marketplace conditions within their jurisdictions.

And, *fourth*, the Commission should avoid benchmark regulation or comparable industry-wide solutions at all costs. As noted in part IV, such broad-brush efforts would limit service providers' flexibility needlessly and distort competitive forces on many U.S.-international routes. Instead, as it has proposed in the wireline context, the Commission should engage in constructive bilateral consultations with individual governments or regulatory authorities after receiving complaints from U.S. carriers regarding specific markets or foreign carriers.

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COMMENTS OF THE GSM ASSOCIATION

In light of the complex and multi-jurisdictional nature of foreign mobile termination rates ("FMTRs"), the GSM Association ("GSMA") urges the Commission to exercise caution before contemplating the regulation of FMTRs, a possibility it has raised in its Notice of Inquiry ("NOI").[1] GSMA's position has four principal foundations. First, the Commission should recognize its jurisdictional limitations with respect to rules governing FMTRs, particularly where such rules would undermine the market-specific efforts of other national regulatory authorities ("NRAs"). Second, the Commission should recognize that FMTRs do not harm consumer welfare and that FCC regulation would not provide an appropriate or effective solution in any event. Third, the Commission lacks the market-specific data necessary to develop a sound regulatory

1 *See The Effect of Foreign Mobile Termination Rates on U.S. Customers*, Notice of Inquiry, 19 FCC Rcd. 21395 (2004) ("*NOI*").

approach, and it does not have the institutional resources to analyze the data fully. And, fourth, the Commission should avoid adopting any regulations that apply specific, worldwide benchmarks to FMTRs.

As the global trade association for GSM mobile operators, GSMA provides a uniquely valuable perspective on the issue of FMTRs. The association, which draws its membership from around the world, represents approximately 660 second and third generation mobile operators and more than 140 manufacturers and suppliers. In aggregate, GSMA's members provide mobile services to nearly 1.1 billion customers in more than 200 countries and territories around the world.

I. The Commission Lacks Jurisdiction to Regulate FMTRs

Adopting unilateral regulations aimed at corralling mobile termination rates in foreign markets would exceed the limits of the Commission's jurisdiction. As a result, the Commission would leave its rules vulnerable to legal challenge based on their unjustifiably extraterritorial reach, and it would violate principles of international comity. Unilateral regulation would ignore, and possibly undermine and contradict, the work of myriad national regulatory authorities around the world that have initiated proceedings to examine mobile termination rates in their home markets.

A. Commission Regulation of FMTRs Would Be Unjustifiably Extraterritorial

Commission regulation of FMTRs would entail an extraterritorial reach that exceeds its jurisdiction. The Commission lacks jurisdiction because of the anatomy of calls to foreign mobile customers. Typically, the caller's local U.S. fixed-line carrier delivers the call to a U.S. international carrier, which delivers the call to a foreign fixed-line carrier, which, in turn, interconnects with the foreign mobile carrier that serves the foreign mobile customer.[2] As a logistical matter, therefore, the U.S. international carrier (which falls within the Commission's regulatory jurisdiction) typically lacks any contractual privity with the foreign mobile carrier that levies the termination charge. Moreover, the U.S. carrier plays no role in establishing the mobile termination rate, which typically derives from the interconnection agreement between the foreign fixed-line carrier and the foreign mobile carrier.

The absence of direct contractual contact between the U.S. international carrier and the foreign mobile provider deprives the Commission of jurisdiction over FMTRs. In *Cable & Wireless P.L.C. v. FCC*, the U.S. Court of Appeals for the D.C. Circuit concluded that the Commission had authority to regulate the settlement rates that U.S. and foreign fixed-line providers pay one another to terminate international traffic.[3] In that case, the court explained that U.S. and foreign providers negotiate with each other directly to establish the applicable settlement rate.[4] The court reasoned that the Commission's regulations imposed obligations only on the U.S. carriers during those negotiations, without imposing obligations on foreign providers.[5]

In this proceeding, by contrast, the Commission's regulations would subject foreign providers to price-control obligations. Since U.S. carriers typically lack privity with the foreign mobile providers that impose termination charges, and since U.S. carriers have no role in the interconnection negotiations that establish those charges, any

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2 *See, e.g., id.* ¶ 3.

3 *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

4 *See id.* at 1226-27.

5 *See id.* at 1229-30 (explaining the economic dynamics of bargaining between U.S. and foreign providers, and concluding that the Commission's rules applied only to domestic carriers "[g]iven the structure of the global telecommunications industry and its resulting incentives").

rules designed to control the charges would necessarily amount to regulation of the third-party foreign providers that negotiate and levy them. Under *Cable & Wireless*, the Commission lacks authority to impose such extraterritorial regulation. Crafting rules to control FMTRs all the same would leave the Commission susceptible to legal challenge.

Moreover, the *Cable & Wireless* court upheld the Commission's assertion of jurisdiction to establish benchmarks for fixed termination on the grounds that foreign telecommunications markets at the time, in the mid 1990s, were largely monopolistic, and indeed, the foreign fixed operators with whom the U.S. carriers had to negotiate were often government-owned.[6] Today's mobile markets are vastly different; most markets, and certainly the markets to which the bulk of U.S. traffic terminates, exhibit competitive characteristics, including mobile operators that are controlled by private entities. Therefore, the court's finding that the FCC had jurisdiction to establish benchmarks for international fixed termination provided by monopolist, often government-owned foreign carriers, is not valid precedent for regulating FMTRs in a competitive, privately-owned global mobile market.

B. The Principle of International Comity Counsels Against Assertion of Jurisdiction

The principle of international comity also counsels against asserting jurisdiction in this case. Unlike a pure jurisdictional inquiry, which addresses whether the

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6 *See id.* at 1227 ("Although the U.S. telecommunications industry has become more competitive, the industry remains non-competitive in much of the rest of the world.... [I]n negotiating settlement rates, foreign monopoly carriers can pit competing U.S. carriers against one another, exploiting the fact that U.S. carriers unwilling to pay settlement rates demanded by foreign carriers will lose business on those routes to higher–bidding domestic competitors.... Through excessive net settlement payments to foreign carriers, U.S. carriers and their U.S. customers effectively subsidize government-owned telephone services in foreign countries.").

Commission *has* authority to regulate, an assessment of comity focuses on whether the Commission *should* assert jurisdiction. Thus, the principle of comity questions whether "the exercise of such jurisdiction is reasonable."[7] When considering whether to exercise jurisdiction in this matter, the Commission should consider, among other things, "the extent to which other states regulate such activities," "the extent to which another state may have an interest in regulating the activity," and "the likelihood of conflict with regulation by another state."[8]

Each of these considerations should dissuade the Commission from imposing regulations that control FMTRs. As explained in part I.A. above, the contractual relations and negotiations underlying FMTRs typically involve only foreign fixed-line providers and foreign mobile providers, *not* U.S. carriers or their customers. Moreover, as the Commission has recognized,[9] and as GSMA explains in part I.C. below, numerous NRAs already regulate mobile termination rates, and many others have initiated proceedings designed to ensure that such rates are cost-oriented. In light of foreign governments' undeniable interest in the conduct of providers within their borders, and considering the array of regulatory initiatives that NRAs have commenced in this area, any effort on the part of the Commission to control FMTRs would likely conflict with other governments' national regulations and violate the principle of international comity.

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7 *Restatement (Third) of Foreign Relations Law of the United States* § 403(1) (1987).

8 *Id.* § 403(2).

9 *See NOI* ¶ 14.

C. Regional Regulatory Bodies and NRAs Have Taken Steps to Regulate FMTRs

Were the Commission to promulgate unilateral and extraterritorial regulation in this area, it would usurp the functions of NRAs and regional regulatory bodies that have familiarity with their markets and that have already taken action to address FMTRs. Indeed, as a practical matter the Commission cannot gather and analyze the cost and market data necessary to match the individual NRAs' familiarity with their own markets. As a result, the Commission can only issue broad-based regulation that would undermine other NRAs' market-specific efforts, while simultaneously sending the wrong signals to foreign governments at a time when the United States seeks to strengthen relations with its partners.

NRAs have an incentive to address the issue. Domestic callers originate most of the traffic that terminates on mobile networks, meaning that the brunt of any above-cost mobile termination rates falls on callers within the NRA's national jurisdiction in the form of higher domestic prices. Accordingly, regional regulatory bodies and foreign regulators have become increasingly active in their regulation of mobile termination rates.

On a regional basis, for instance, the Independent Regulators Group ("IRG")—a group of European NRAs that considers matters of shared interest such as interconnection and termination rates—has issued principles that apply to its member NRAs as they review FMTRs.[10] The IRG principles endorse price controls among other measures, and

[10] *See* Independent Regulators Group, *Principles of Implementation and Best practice on the application of remedies in the mobile voice call termination market* (Nov. 20, 2003), *available at* http://www.opta.nl/download/PIBS%20MTA%20Final.pdf.

they suggest that only national regulators possess sufficient familiarity with their home markets to craft effective FMTR regulations.[11]

As the Commission recognizes in the NOI, a variety of national regulators have also implemented regulations relating to FMTRs or have commenced proceedings to introduce such regulation.[12] In June 2004, for instance, the United Kingdom's regulator, Ofcom, issued a statement outlining a series of regulatory remedies that reflect the contours of the mobile termination market in the U.K. and the position of competing mobile providers within it.[13] Ofcom's regulatory approach subjects individual mobile providers to various responsibilities, including heightened interconnection obligations, contract transparency obligations, non-discrimination requirements, and a tailored schedule of termination charge price caps that vary from carrier to carrier.[14]

The Dutch regulator, Onafhankelijke Post en Telecom Autoriteit ("OPTA"), provided another approach, adopting policy rules for the regulation of mobile termination rates in which it assessed the characteristics of the Dutch mobile termination market. OPTA then calculated a schedule of maximum termination charges that will decrease over time until they reach a level that OPTA finds to be cost-oriented.[15] As a result of the

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[11] *See id.* at 3.

[12] *See NOI* ¶ 14 & App. B.

[13] *See* Ofcom, *Wholesale Mobile Voice Call Termination* (June 1, 2004).

[14] *See id.* at 3-4, 35, 39, 59-60.

[15] *See* OPTA, *Policy rules regarding the regulation of mobile terminating tariffs* (March 28, 2002), *available at* http://www.opta.nl/download/mta_policyrules_300902.pdf; *see also* OPTA, *Modification of the policy rules regarding regulation of mobile terminating tariffs* (July 22, 2002), *available at* http://www.opta.nl/download/mta_aanpassing_300902.pdf.

issuance of its policy rules, OPTA has reached negotiated agreements with several Dutch mobile providers with respect to voluntary reductions in mobile termination rates.[16]

The Autorité de Régulation des Télécommunications ("ART"), the French regulator, has also addressed mobile termination rates. In 2001, ART adopted a cost-oriented approach to termination rates by imposing a decreasing price cap on Orange and SFR, the two French mobile operators dominant in the national interconnection market (85% of the terminating traffic).[17] ART extended the price cap to all three national mobile operators (Orange, SFR, and Bouygues) in December 2004, and it imposed a new price cap obligation for the period 2005-2007.[18] As a result of these cost-oriented price-cap efforts, ART expects mobile termination rates to decrease by more than 60% from 2002 to 2006.

The Australian Competition and Consumer Commission ("ACCC") has also undertaken to regulate mobile termination rates this year. In a decision issued in June 2004, the ACCC relied on a total-service long-run incremental cost analysis to conclude

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16 *See* OPTA, *Notification regarding OPTA's policy on mobile termination tariffs* (Dec. 4, 2003), *available at* http://www.opta.nl/download/Notification%20regarding%20OPTA%20MT%20policy.pdf.

17 *See* ART, Décision No. 01-970, Le niveau de la charge de terminaison d'appel sur le réseau de Orange France (Nov. 16, 2001); ART, Décision No. 01-971, Le niveau de la charge de terminaison d'appel sur le réseau de SFR (Nov. 16, 2001), *both available at* http://www.art-telecom.fr.

18 *See* ART, Décision No. 04-936, La détermination des marchés pertinents concernant la terminaison d'appel vocal sur les réseaux mobiles en métropole (Dec. 9, 2004); ART, Décision No. 01-937, L'influence significative de la société Orange France sur le marché de gros de la terminaison d'appel vocal sur son réseau et les obligations imposées à ce titre (Dec. 9, 2004); ART, Décision No. 01-938, L'influence significative de la société SFR sur le marché de gros de la terminaison d'appel vocal sur son réseau et les obligations imposées à ce titre (Dec. 9, 2004); ART, Décision No. 04-939, L'influence significative de la société Bouygues Telecom sur le marché de gros de la terminaison d'appel vocal sur son réseau et les obligations imposées à ce titre (Dec. 9, 2004)), *all available at* http://www.art-telecom.fr.

that the cost of mobile terminating access service falls somewhere been 5 and 12 Australian cents (approximately 4 to 9 U.S. cents) per minute.[19] Accordingly, the ACCC imposed an immediate price cap of 21 Australian cents per minute that will decrease by 3 cents every year until it reaches 12 cents per minute in January 2007.[20]

This broad range of regulation at the regional and national levels should discourage the Commission from launching its own unilateral and extraterritorial effort that would only duplicate or contradict rules already in place.

II. FMTRs Do Not Harm Consumer Welfare

The Commission must also assess whether the problem it perceives is a problem at all with respect to consumer welfare. In particular, the Commission should consider the different demand characteristics under a "calling party pays" ("CPP") regime and "receiving party pays" ("RPP") regime. Moreover, it should recognize that FMTRs constitute only a single line item among a host of costs that fall on U.S. callers, and it should determine whether other aspects of the aggregate rate merit closer inspection than FMTRs.

A. The Commission Should Assess Whether FMTRs Harm Consumers

As a threshold matter, the Commission must assess whether FMTRs pose a consumer-welfare problem at all. Anecdotal evidence suggests they do not. For instance, there is reason to believe that most U.S.-based international callers are savvy consumers who know when they are calling mobile numbers overseas and understand that such calls

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19 *See* ACCC, *Mobile Services Review: Mobile Terminating Access Service*, Final Decision at xix (June 2004), *available at* http://www.accc.gov.au/content/index.phtml/itemId/520596.

20 *See id.*

are generally more expensive than calls to landline telephones. In addition, calls to mobile recipients overseas offer U.S. consumers the convenience of reaching mobile subscribers past the close of the business day, since, given time differences, many international calls are placed after or before business hours. Such calls are also more likely to be billed at off-peak rates. Mobile calls generally connect more quickly than calls to landline numbers, meaning that calls are shorter and subject to fewer minutes of charges. Similarly, for reasons related to societal conventions and ambient noise, mobile calls are generally shorter than comparable fixed-line calls. In aggregate, these factors suggest that consumer awareness and cost savings may outweigh any perceived consumer-welfare problems associated with FMTRs.

B. Different Termination Rates Under CPP and RPP Regimes Reflect Different Demand Characteristics

In addition, higher termination rates in CPP regimes reflect, at least in part, different demand characteristics and different methods of apportioning costs between the calling and receiving parties. At a fundamental level, RPP and CPP rates vary because the two regimes generate different demand conditions. Under RPP regimes, the call recipient pays the termination fee, and under CPP regimes, the call initiator pays. Since the called and calling parties likely place different values on a particular call (*i.e.*, they are prepared to pay different prices for the same call), the different governing regimes produce different demand levels. In competitive markets, operators price services by reference to these demand considerations, which results in different rates under RPP and CPP regimes.

C. The Commission Should Assess Aggregate Costs of Calls to Foreign Mobile Subscribers

By focusing its attention on unregulated FMTRs, the Commission disregards at least two cost-related aspects of international fixed-to-mobile communications that indicate that FMTRs are not the consumer burden that some suggest. First, the Commission's focus on FMTRs sidelines its review of other significant mark-ups and costs that fall on U.S. callers. The Commission observes in the NOI that the termination charge that ultimately reaches a U.S. caller often differs from the charge that the foreign mobile operator levies.[21] By the time it appears on the U.S. caller's bill, the termination rate often includes surcharges from other intermediary service providers, most notably the U.S. carrier that originates the call and the foreign fixed-line carrier that hands it to the foreign mobile operator. These add-on costs obscure the original charges associated with termination on foreign mobile networks, and they increase the final charge that falls on U.S. callers. Thus, as a first step, the Commission must collect and assess data that allow it to separate these varying elements of the total charge.

Second, the Commission's review of FMTRs largely bypasses the large proportion of U.S.-originated international fixed-to-mobile calls that terminate in RPP countries with low termination rates (like Canada) or in CPP countries that cap termination rates (like the U.K and France). In Table 4 of the NOI, the Commission presents a wealth of data regarding the surcharge costs that U.S. callers incur for calls to mobile subscribers around the world. Notably, however, the table omits any reference to Canada, the largest destination market for U.S.-originated calls to foreign mobile subscribers. The same calculation methodology that the Commission employed in

[21] *See NOI* ¶ 4-6, 18, 21-23.

preparing Table 4 reveals that U.S. calls to Canadian mobile subscribers totaled nearly 1.5 billion minutes in 2002—far more than to any other country in the world, and equivalent to more than 20% of the total global minutes reported in Table 4.[22] A review of U.S. fixed-line carriers' mobile surcharges reveals, moreover, that U.S. callers pay either a surcharge of only a penny per minute for those calls or no surcharge at all.[23]

In addition, Table 4 demonstrates that other countries receiving large volumes of U.S.-originated traffic impose relatively low mobile termination rates or have taken steps to control such rates. For instance, U.S. callers pay an average termination surcharge of less than five cents to call mobile subscribers in the Philippines (more than 921 million minutes), less than six cents to call mobile subscribers in the Dominican Republic (more than 287 million minutes), and less than three cents to call mobile subscribers in Guatemala (more than 272 million minutes). Likewise, national regulators have taken steps to constrain mobile termination rates in other countries that receive large volumes

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22 *See* Wireline Competition Bureau, *2002 International Telecommunications Data*, Table A1 (March 2004) (number of outbound minutes to Canada totaled 4,850,288,895 in 2002), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Intl/4361-f02.pdf; Industry Canada, *Telecommunications Service in Canada: An Industry Overview* § 3.1 (Aug. 10, 2004), *available at* http://strategis.ic.gc.ca/epic/internet/insmt-gst.nsf/PrintableE/sf06084e.html (for every 37 subscribers to wireless service in Canada in 2002, there were 63 subscribers to wireline service, which results in a mobile-to-wireline ratio of 58.7%). Borrowing the Commission's methodology from Table 4, a mobile ratio of 58.7% in 2002 amounts to an adjusted mobile ratio of 29.35%. Applying that ratio to a total of 4,850,288,895 outbound minutes results in an estimated 1,424,044,819 outgoing minutes bound for mobile phones in Canada.

23 *See, e.g.*, AT&T, *AT&T Mobile Termination Charge Information for International Callers*, *available at* http://www.consumer.att.com/global/english/consumer_information/mobileterminatingnumber.html (one penny); MCI, *International Mobile Termination*, *available at* http://consumer.mci.com/mci_service_agreement/res_pdf/IMT_01_01_2005.pdf (no surcharge); Sprint, *International Mobile Termination*, *available at* www.sprint.com/mobilesurcharge (no surcharge).

of U.S.-originated calls to mobile subscribers, including the United Kingdom (more than 638 million minutes), Japan (more than 214 million minutes), and France (more than 173 million minutes). Taken together, calls to these six countries account for nearly 40% of the minutes identified in Table 4. These observations—*i.e.*, call minutes to mobile subscribers in countries with cost-oriented or regulated termination rates dwarfing call minutes to any other country—suggest that FMTRs may not impose the cost burdens to U.S. consumers that some suggest, or at least not in the global manner that the Commission describes.[24]

Taken together, these cost-related considerations demonstrate that excessive FMTRs play a smaller role than the Commission suspects in the aggregate costs that U.S. callers incur.

III. THE COMMISSION LACKS NECESSARY DATA AND ANALYTICAL CAPACITY

The Commission must also assess whether it is capable of crafting an appropriate regulatory solution given the extraterritorial nature of its inquiry. Most important, consistent with the Administrative Procedures Act,[25] the Commission must ensure that it can obtain and then analyze meaningfully the data necessary to address FMTRs in varied markets around the world.

The Commission's 1997 fixed benchmarks relied on cost inputs from publicly available information for tariffed components for the fixed networks at issue, obtained

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[24] By contrast, only a relatively small number of outbound minutes reach CPP countries in which regulators have not taken meaningful steps to control mobile termination charges and therefore have termination surcharges in the 15 cents – 30 cents range. However, those routes tend to be low-volume. *See NOI*, App. E, Table 4.

[25] *See* 5 U.S.C. § 551 *et seq.*

from the International Telecommunications Union and other public sources. The Commission does not have comparable cost data for foreign mobile network components.

In their present form, the mobile data in the Commission's possession cannot support a unilateral multi-jurisdictional regulatory initiative. Among other things, the Commission's data defy meaningful analysis because they include surcharges and other mark-ups that obscure the original termination charges. As such, even data demonstrating excessive charges applied to U.S. callers on a particular route provide little guidance as to whether the foreign mobile network operator engaged in unreasonable conduct, whether an intermediary provider added additional fees, or whether some other factor resulted in a higher charge. Thus, without more detailed data, any effort to constrain rates via unilateral and global regulation may impose unjustified burdens on providers around the world.

More important, the Commission lacks the institutional capacity to gather cost data from more than 160 countries and then analyze that data in light of particularized market conditions that vary from country to country. Indeed, the Commission apparently recognizes this limitation in the NOI, where it questions whether "applying any single cost standard to 161 individual countries . . . pose[s] problems with regard to special economic conditions in certain countries."[26]

IV. THE COMMISSION SHOULD AVOID BENCHMARKS AND SIMILAR INDUSTRY-WIDE MEASURES

Even if the Commission determines that it can regulate FMTRs notwithstanding its jurisdictional and substantive limitations, it should avoid developing benchmark regulations or comparable industry-wide solutions for FMTRs. Almost by definition,

[26] *NOI* ¶ 39.

benchmarks applicable to hundreds of competitive mobile carriers are blunt and overbroad because they apply the same regulatory treatment to a host of different carriers and marketplace conditions. Applied in the context of mobile termination rates, a benchmark approach would undoubtedly cover scores of countries that have already taken steps to regulate mobile termination rates. As a result, benchmarks would impose needless limits on U.S. providers' flexibility in some circumstances, thereby distorting competition on U.S.-international routes. Benchmark regulation of FMTRs could distort competition in the U.S. by raising costs of compliance for U.S. carriers newly subject to benchmarks and related reporting requirements, and creating opportunities for arbitrage between domestic and foreign mobile termination.

Where presented with specific evidence of discrimination or anti-competitive conduct by a foreign mobile operator, the Commission should work with its regulatory counterpart in the particular market in an effort to resolve the specific problem, rather than apply a single broad-brush "solution" to the world as a whole. Indeed, the Commission took this approach in its *2004 ISP Reform Order*, resolving to engage in bilateral discussions as a first step following complaints of specific problems, before turning to unilateral competitive safeguards.[27] As explained in part I.C. above, NRAs around the world have taken steps to address FMTRs and related issues in their home markets. Because each NRA has the greatest familiarity with the nuances of its home market, the Commission should work bilaterally with appropriate NRAs to resolve

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[27] *See International Settlements Policy Reform International Settlement Rates*, First Report and Order, 19 FCC Rcd. 5709, 5731 ¶ 46 (2004) ("Because each controversy presents somewhat different circumstances, our first response to allegations of anticompetitive conduct in commercial disputes will be to consult with foreign regulators in coordination with appropriate Executive Branch agencies.").

apparent problems. Accordingly, the Commission should consider employing, as appropriate, the particularized tools it developed in the *2004 ISP Reform Order* to combat anti-competitive conduct in individual markets, which include working with overseas counterparts, in response to U.S. carrier's complaints regarding specific markets or foreign carriers.[28]

CONCLUSION

For all of the foregoing reasons, the Commission should exercise caution before contemplating the regulation of FMTRs. In particular, it should recognize its jurisdictional limits in this area, assess whether the FMTR problem actually presents a problem open to a U.S. unilateral regulatory solution, and consider its substantive capacity to obtain and analyze the data necessary to develop an effective regulatory regime. Equally important, the Commission should avoid FMTR benchmark solutions or similar worldwide measures that ignore the particular features of individual, competitive markets. By failing to take these preliminary steps, the Commission risks undermining the ongoing efforts of other NRAs, increasing operators' burdens while reducing their flexibility, and sending the wrong signals to foreign governments just as the United States seeks to strengthen international ties.

[28] *See id.* at 5731-32 ¶ 46-47.

Respectfully Submitted

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